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No. 90-986

In The
Supreme Court of the United States
October Term, 1990

Armco Export Sales Corporation, *et al.*,
Petitioners,
v.
Comptroller of the Treasury,
Respondent.

On Petition for Writ of Certiorari to the Court of Special Appeals of Maryland

BRIEF OF THE COMMITTEE ON STATE TAXATION OF THE COUNCIL OF STATE CHAMBERS OF COMMERCE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTRODUCTORY STATEMENT

This brief is submitted by the Committee on State Taxation of the Council of State Chambers of Commerce as *amicus curiae* in support of the petitioners' petition for writ of certiorari in the above-captioned case. Written consents of the petitioners and respondent have been obtained and filed with the Clerk of this Court.

INTEREST OF *AMICUS CURIAE*

The Council of State Chambers of Commerce (Council), organized in 1932, consists of 43 state chambers of commerce. The Committee on State Taxation (COST), an advisory committee of the Council, consists of 364 corporate members. Most of these corporations have a large number of subsidiaries, each of which conducts business in one or more states.

COST member corporations conduct a substantial portion of the interstate commerce in the United States. The members are representative of that part of the Nation's business sector which is most directly affected by the state taxation of interstate operations. COST's objective is to preserve and promote equitable and nondiscriminatory state and local taxation of corporations and to ensure that states do not exceed constitutional limitations in imposing their various taxes. COST member companies recognize their responsibility to pay their fair share of state tax to the jurisdictions in which they do business. However, COST strongly objects to the expansion of jurisdictional nexus beyond constitutional limits to allow a State to assess a tax against an entity that has no physical presence in that State.

COST member companies have a great concern in seeing that traditional due process nexus standards are observed and maintained. COST members and their unitary subsidiaries are, of course, subject to formula apportionment in those states which have adopted a combined scheme of taxation, but even under such a scheme of taxation non-nexus members of the combined group are not subject to tax. Those members of the combined group are taxed only in the states in which they have nexus. COST members are vitally interested in seeing that the decision of the Maryland Court of Special Appeals, which extends taxing jurisdiction to a corporate entity with no connections to the State, be reversed.

SUMMARY OF ARGUMENT

The only issue before the Court in this case is whether, under the Due Process Clause, a State may impose its taxing jurisdiction over a corporate entity that has no physical presence in that State. In the decision below, the State of Maryland has completely ignored Due Process protections. With absolute disregard to well established principles that a state has no jurisdiction over a person or corporation that has no contacts with that state, the State has issued an assessment against a corporation which it admits has no property or employees within Maryland.

The lower court's decision is mired in its attempt to apply "unitary", a concept used to determine how a state may measure an *in-state* corporation's tax base, to a case in which the only issue is "nexus". Nexus is the term used to describe the minimum contacts necessary under the Due Process Clause for a state to exercise its taxing jurisdiction over an *out-of-state* corporation. The lower court's confused analysis has given us the surreal result in which Maryland has assessed a franchise tax against a corporate entity which has no contact with the State. Such a result is clearly without authority, creates a dangerous precedent for multi-entity taxpayers and must be overruled.

ARGUMENT

THE MISAPPLICATION OF THE UNITARY CONCEPT TO CREATE "IMPUTED NEXUS" VIOLATES THE DUE PROCESS CLAUSE

According to the lower court, the three key elements necessary for constitutional nexus are: 1) the parent of the corporate entity which the State seeks to tax is engaged in business in the State; 2) the parent is unitary with the entity it seeks to tax; and 3) the apportionment factor is fair. Petitioners' App. 8a. Under this analysis, the State claims to have nexus with a corporate entity that has no physical presence in the State. Such "imputed nexus" ignores this Court's "consistent adherence to one time-honored concept: that due process requires some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax." *Miller Bros. Co. v. Maryland*, 347 U.S. 340, 344-345 (1954). Thus, "where there is jurisdiction neither as to person nor property, the imposition of a tax would be ultra vires and void". *Id.* at 342, quoting *St. Louis v. Ferry Co.*, 11 Wall. 423, 430. As this Court cogently stated in *Wisconsin v. J.C. Penney Co.*, 311 U.S. 435 (1940):

> "Taxable event," "jurisdiction to tax," "business situs," "extraterritoriality," are all compendious ways of implying the impotence of state power because state power has nothing on which to operate. These tags are not instruments of adjudication but statements of result in applying the sole constitutional test for a case like the present one. That test is whether property was taken without due process of law, or if paraphrase we must, whether the taxing power exerted by the state bears fiscal relation to protection, opportunities and benefits given by the state.

Id. at 444. When that test is applied to the present case, it is clear that Maryland has given no protection, opportunities or benefits to the petitioners since they have no physical presence in the State.

The issue in this case is simply whether Maryland can assess a tax against petitioners, who have no physical presence in the State, *not* whether Maryland can constitutionally include DISC income in the apportionable income of the parent corporation which does have presence in the State. Within the appropriate statutory and procedural framework the State may very well be able to include the DISC income it wishes to reach in the parent corporations' taxable incomes.[1] However, the fact that this income might have otherwise been reached by the State does not excuse Maryland from the constraints of the Due Process Clause.

In an attempt to escape these constraints, as well as its own non-combination law, the lower court developed its "imputed nexus" test, based on the unitary concept, a concept which is completely unrelated to the issue of nexus. The unitary concept simply allows the inclusion in the apportionment formula of out-of-state values for the purpose of determining an in-state taxpayer's income. It is the in-state taxpayer's income that is taxed. *Underwood Typewriter Co. v. Chamberlain,* 254 U.S. 113 (1920); *International Harvester Co. v. Evatt,* 329 U.S. 416 (1947).[2] Significantly, out-of-state income of in-state taxpayers is *not* taxed. It follows that out-of-state income of our-of-state taxpayers should not be taxed.[3]

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[1] As is recognized by the parent corporations of the petitioners, which have filed returns including the DISC income in states in which they do business that require combined unitary filing.

[2] Petitioners have presented a thorough discussion of the development and application of the unitary concept. Therefore, such discussion will not be repeated in the brief of *amicus*.

[3] Obviously, petitioners had no Maryland property, payroll or sales factors to use to apportion any income to the State. To avoid this fatal flaw, the State used the parent corporations' property and payroll factors.

Since the unitary concept does not in fact allow taxation of out-of-state income, the unitary concept, as applied by this Court, has in no way supported that a State has jurisdiction to tax income earned outside the State or to impose a tax on a corporation with no physical presence within the State. *See Mobil Oil Corporation v. Commissioner of Taxes of Vermont*, 445 U.S. 425 (1980); *Container Corporation of America v. Franchise Tax Board*, 463 U.S. 159 (1983).

The State of Maryland has chosen a corporate income tax system under which it imposes its tax on each separate corporate entity doing business within the State. Md. Ann. Code art. 81. It may be that there are instances in which the State could increase its revenues collected from particular corporations if it had chosen to use a combined unitary reporting system such as that used by California. *See Container, supra.* However, having chosen a system based on separate corporate entities, Maryland must live with that system. Thus, where a corporation employs subsidiaries to do business in States other than Maryland, that corporate separation must be recognized and the relationship between the parent and the subsidiaries cannot be used to extend jurisdiction. *See, Cannon Manufacturing Company v. Cudahy Packing Company*, 267 U.S. 333 (1925). Despite all precedent to the contrary, this is exactly what the State of Maryland is attempting to do in this case. The very purpose of the Due Process Clause is to assure fairness and equity in that there must be some concrete connection between a State and the entity over which it seeks to exert its jurisdiction. The decision of the lower court threatens this fundamental basis of due process and cannot be allowed to stand.

CONCLUSION

For the foregoing reasons, the Committee on State Taxation respectfully requests that the Petitioners' Petition for Writ of Certiorari be granted.

Respectfully submitted,

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